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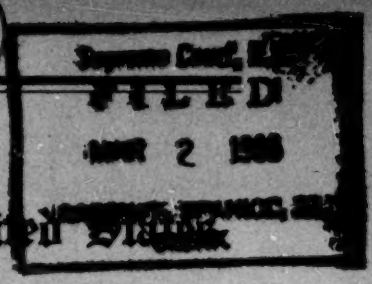

IN THE

Supreme Court of the United States

October Term, 1987

Ralph R. Mabey, Examiner of A. H. Robins Company, Incorporated,

Petitioner,

v.

The Official Committee of Equity Security Holders of A. H. Robins Company, Incorporated; A. H. Robins Company, Incorporated; Dalkon Shield Claimants' Committee of A. H. Robins Company, Incorporated; and Legal Representative of Future Tort Claimants of A. H. Robins Company, Incorporated,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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BRIEF IN OPPOSITION BY RESPONDENT OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS OF A. H. ROBINS COMPANY, INCORPORATED

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QUESTION PRESENTED

Whether the Court of Appeals for the Fourth Circuit properly held that the Bankruptcy Code and Bankruptcy Rules prohibit distributions, prior to the confirmation of a plan of reorganization and compliance with the Code's disclosure, voting, and confirmation requirements, to certain alleged unsecured creditors whose claims have not yet been allowed in the Chapter 11 case.

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BRIEF IN OPPOSITION BY RESPONDENT OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS OF A. H. ROBINS COMPANY, INCORPORATED

Respondent Official Committee of Equity Security Holders (the "Equity Committee") of A. H. Robins Company, Incorporated ("Robins" or the "Debtor"), the statutory representative of Robins' public shareholders, respectfully requests that this Court deny the petition for a writ of certiorari to review a judgment of the United States

Court of Appeals for the Fourth Circuit (the "Court of Appeals") in this case. The opinion is reported at 832 F.2d 299 (4th Cir. 1987).

STATUTES INVOLVED

The statutes involved are Section 105(a) and Sections 1121-1129 of the Bankruptcy Code and Bankruptcy Rule 3021. The text of Section 105(a) is cited at Pet. App. 79a.[1] The text of Sections 1121-1129 and Rule 3021 is printed in the annexed Appendix.

STATEMENT OF THE CASE

A. Nature of the Case

On April 29, 1987, nearly two years after the commencement of Robins' Chapter 11 case and prior to the confirmation of a plan of reorganization, Ralph R. Mabey, the examiner appointed in this case ("petitioner"), and certain other parties in interest filed a joint motion requesting that the United States District Court for the Eastern District of Virginia (the "District Court") approve the establishment of a $15 million "emergency treatment fund." The fund would benefit a limited number of the women who have alleged that they were rendered infertile as a consequence of their use of the Dalkon Shield prior to the commencement of the reorganization case and are purportedly "potential candidates" for tubal reconstructive surgery or *in vitro* fertilization. (Pet. App. 16a-25a).

The movants contended that such procedures might restore fertility in certain of those prepetition, unsecured

1. "Pet." refers to the Petition for Certiorari; "Pet. App." refers to the Appendices to the Petition for Certiorari; and "J.A." refers to the Joint Appendix in the Court of Appeals.

Dalkon Shield claimants who might be eligible to participate in the program.[2] The beneficiaries of the emergency treatment fund were to be selected from among the hundreds of thousands of individuals who filed notices of claim with the Bankruptcy Court alleging that they had been, or might be, injured by the use of the Dalkon Shield.[3] At the time of the hearing on the joint motion, over 300,000 notices of claim had been filed; none had been allowed or even estimated. The District Court subsequently disallowed over 100,000 claims.[4] The remaining claims are not yet "allowed claims" for purposes of distribution under a plan of reorganization, but are subject to further proof by each claimant as well as objection by the Debtor and other parties in interest.

The cost of the medical procedures proposed in the joint motion was estimated by petitioner at $10,000-$15,000 per claimant. Robins' payments on account of the selected claimants would be nonrefundable to the estate even if it were subsequently determined that the claimant did not have an allowed claim or that the claimant had an allowed claim

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2. Petitioner contends that the success rate for the reconstructive surgery ranges from 30 to 60 percent. (Pet. 6-7 n.2). No such finding was made by the Court of Appeals or the District Court. Such a contention ignores the possibility, reported in the same affidavits upon which petitioner relies, that the likelihood of success may be reduced "precipitously," even to 0%. (Pet. App. 33a-34a, 42a).

3. The notices of claim are postcards or other notices which generally contain only a statement that the claimant or a family member used the Dalkon Shield and suffered (or may suffer) an injury therefrom. No proof of injury was required to be submitted with the notices of claim.

4. Later, the District Court estimated the aggregate value of the remaining, potentially valid Dalkon Shield claims, plus related administrative costs, at $2.475 billion.

in an amount less than the payment made from the emergency treatment fund.[5]

On February 1, 1988, Robins filed its fifth amended and restated plan of reorganization (the "Plan") and a related disclosure statement (the "Disclosure Statement").[6] The Plan, which has the support of the Debtor and all official committees, including the Dalkon Shield Claimants' Committee, provides for the payment of all valid Dalkon Shield claims and the post-confirmation establishment of an emergency treatment fund similar to the fund proposed in the joint motion.

B. Proceedings Before the District Court

On May 18, 1987, the District Court heard arguments regarding the joint motion. (J.A. 53-87). The Equity Committee asserted that the establishment and funding of the emergency treatment fund would violate the Bankruptcy Code's fundamental distributive scheme, which requires that distributions to unsecured creditors be made only in accordance with a plan of reorganization that has satisfied the Bankruptcy Code's disclosure, voting, and confirmation requirements. (J.A. 45-52). No testimony was introduced at the hearing; petitioner simply filed two affidavits discussing medical procedures for treating infertility. (Pet. App. 27a-44a).

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5. Although payments were to be made directly to medical care providers rather than to claimants, the Court of Appeals recognized that the effect of such payments would be to benefit the claimants. (Pet. App. 3a). Thus, the establishment of the emergency treatment fund would constitute the payment by Robins of prepetition unsecured claims.

6. Certain technical revisions to the Plan and Disclosure Statement were filed on February 11, 1988.

On May 21, 1987, the District Court entered an order directing the Debtor to establish the $15 million emergency treatment fund. (Pet. App. 9a). The District Court's order contained neither findings of fact nor conclusions of law, and it did not refer to any supporting authority.

On June 10, 1987, the District Court denied the Equity Committee's motion for a stay pending appeal. (Pet. App. 10a-14a). Nevertheless, the District Court "recognize[d] that the establishment of an emergency treatment fund is unusual and, indeed, may be unprecedented" (Pet. App. 11a) and acknowledged that the Equity Committee's position in opposition to such a fund was "well taken." (Pet. App. 11a-12a). In denying the motion for a stay, the District Court mentioned, for the first time, the purported statutory authority supporting the emergency treatment fund, citing its "expansive equity power" under Section 105(a) of the Bankruptcy Code as the sole justification for its prior action. (Pet. App. 11a).

C. Proceedings Before the Court of Appeals

The Court of Appeals unanimously reversed the District Court. (Pet. App. 15a).[7] The Court of Appeals held that the "clear language" of the Bankruptcy Code and the Bankruptcy Rules prohibits "the payment in part or in full, or the advance of monies to or for the benefit of unsecured claimants prior to the approval of the plan of reorganization." (Pet. App. 7a). Such payments also would im-

7. By order filed on July 7, 1987, the Court of Appeals had previously granted the Equity Committee's motion for a stay pending appeal of the District Court's order and established an expedited briefing schedule.

properly "afford preferential treatment to [certain] claimants over other similarly situated unsecured Dalkon Shield claimants and over general unsecured creditors." (Pet. App. 3a). Citing the specific disclosure, voting, and confirmation provisions of Sections 1121-1129 of the Bankruptcy Code, as well as Bankruptcy Rule 3021, the Court of Appeals concluded that the emergency treatment fund "violates the clear policy of Chapter 11 reorganizations by allowing piecemeal, pre-confirmation payments to certain unsecured creditors." (Pet. App. 7a-8a).

Addressing the only authority suggested by the District Court, the Court of Appeals held that Section 105(a) is "not a license for a court to disregard the clear language and meaning of the bankruptcy statutes and rules." (Pet. App. 6a). Instead, the Court of Appeals ruled, a bankruptcy court's " 'equitable powers must be strictly confined within the prescribed limits of the Bankruptcy Act.' " (Pet. App. 7a) (citation omitted). Thus, the language and intent of the Bankruptcy Code and the Bankruptcy Rules constrained the lower court's authority under Section 105(a) to award pre-confirmation distributions to unsecured creditors, and required reversal.[8]

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8. Although the District Court relied exclusively on Section 105(a) in authorizing the emergency treatment fund, petitioner urged alternative grounds for affirmance before the Court of Appeals. The Court of Appeals found such arguments unsupported, holding that none of petitioner's purported authorities would "allow the court to violate the clear dictates of the Bankruptcy Code, by paying certain unsecured claimants before their claims have been allowed and before a confirmed plan of reorganization is in place." (Pet. App. 8a).

REASONS FOR DENYING THE PETITION

This is not a case in which there are "special and important reasons" for granting certiorari. S. Ct. R. 17.1. The Court of Appeals upheld two basic tenets of bankruptcy law: (1) that holders of unsecured claims which arose prior to the Chapter 11 filing may not receive payment on account of such claims until a plan of reorganization is confirmed after compliance with the Bankruptcy Code's disclosure, voting, and confirmation requirements; and (2) that similarly situated unsecured creditors must be treated equally.[9]

The Court of Appeals' holding does not conflict with any decision of this Court or any other Court of Appeals. To the contrary, the Court of Appeals' decision comports fully with other decisions which recognize that the equitable powers of a bankruptcy court are circumscribed by the language and intent of the Bankruptcy Code and the Bankruptcy Rules. Section 105(a) may be invoked only to implement the statutory scheme. As the Court of Appeals held, Section 105(a) is not a license to abrogate the provisions of the Bankruptcy Code and the Bankruptcy Rules regarding the plan of reorganization confirmation process.

The Court should also deny certiorari because the matter likely will be rendered moot. The recently-filed consensual Plan provides for the post-confirmation establishment of an emergency treatment fund similar to petitioner's proposal. If this Plan is confirmed, there will be no dispute for this Court to resolve.

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9. To date, the individuals who would purportedly benefit from the emergency treatment fund have not been found to hold allowed unsecured claims entitled to a distribution under a confirmed plan of reorganization.

A. The Court of Appeals Properly Held that the Bankruptcy Code and Bankruptcy Rules Prohibit Payments to Certain Unsecured Creditors Prior to the Confirmation of a Plan of Reorganization

The issue before the Court of Appeals was whether the District Court properly invoked equitable principles alone to circumvent the provisions of the Bankruptcy Code and the Bankruptcy Rules which prohibit distributions to unsecured creditors prior to the confirmation of a plan of reorganization. The Court of Appeals held that the District Court did not enjoy such liberties. Rather, its powers under Section 105(a) are expressly, and necessarily, confined to "carry[ing] out the provisions" of the Bankruptcy Code; those provisions cannot simply be disregarded, even in the interest of equity. (Pet. App. 6a).

The Court of Appeals held that the pre-confirmation establishment of an emergency treatment fund violated both the letter and spirit of the Bankruptcy Code and the Bankruptcy Rules. The fund afforded preferential treatment to its beneficiaries over other Dalkon Shield claimants and general unsecured creditors. It did so, moreover, *before* confirmation of a plan of reorganization and in violation of the Bankruptcy Code's detailed disclosure, voting, and confirmation requirements, which are prerequisites to distributions in a Chapter 11 case. *See generally* 11 U.S.C. §§ 1121-1129 (1988). The emergency treatment fund also violated Bankruptcy Rule 3021, which governs distributions in Chapter 11 cases and provides, in pertinent part, that "[*a*]*fter* confirmation of a plan, distribution shall be made to creditors whose claims have been allowed." (emphasis added).

These specific statutory provisions reflect the carefully crafted congressional scheme that governs every Chapter 11 case in order to ensure fair and equal treatment of similarly situated creditors. Attempts to "short circuit" this plan confirmation process -- such as through a pre-confirmation sale of significant assets that has the practical effect of dictating some of the terms of a plan of reorganization -- run afoul of the Bankruptcy Code's distributive scheme and cannot be countenanced. *See Pension Benefit Guar. Corp.* v. *Braniff Airways, Inc. (In re Braniff Airways, Inc.)*, 700 F.2d 935, 940 (5th Cir. 1983); *see also In re Continental Air Lines, Inc.*, 780 F.2d 1223, 1227-28 (5th Cir. 1986). The emergency treatment fund constituted a similar, improper effort to "short circuit" the applicable statutory scheme.

It has long been recognized that a bankruptcy court's equitable powers are limited by the Bankruptcy Code and the Bankruptcy Rules. In *Central Trust Co.* v. *Official Creditors' Comm. of Geiger Enters., Inc.*, 454 U.S. 354 (1982) (per curiam), this Court ruled that considerations of the best interests of the estate or the conservation of judicial resources do not justify deviation from the Bankruptcy Code:

> "It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the law-making body which passed it, the sole function of the courts is to enforce it according to its terms." While the Court of Appeals may have reached a practical result, it was a result inconsistent with the unambiguous language used by Congress.

454 U.S. at 359-60 (citation omitted); *accord In re Chicago, Milwaukee, St. P. & Pac. R.R.*, 791 F.2d 524, 528 (7th Cir. 1986) ("The fact that a proceeding is equitable does not give the judge a free-floating discretion to redistribute rights in accordance with his personal views of justice and fairness, however enlightened those views may be."); *In re Continental Air Lines, Inc.*, 61 Bankr. 758, 781 n.47 (S.D. Tex. 1986) ("[S]ection 105 does not give bankruptcy courts the authority to contravene specific provisions of the Code . . . [T]he bankruptcy court is limited by the express terms of the Code; the court must apply bankruptcy law, not rewrite it."); *In re Johns-Manville Corp.*, 26 Bankr. 405, 414 (Bankr. S.D.N.Y. 1983), *aff'd*, 40 Bankr. 219 (S.D.N.Y. 1984) ("Section 105 does not have a life of its own. . . ."); *see also* 2 *Collier on Bankruptcy* ¶ 105.02, at 105-7-8 (15th ed. 1987) ("Section 105 is not without limits. It does not permit the court to ignore, supersede, suspend or even misconstrue the statute itself or the rules.") (footnote omitted).

The Court of Appeals did not depart from traditional equitable principles applicable in bankruptcy cases, as petitioner asserts. (Pet. 11). To the contrary, the Court of Appeals recognized and endorsed such principles. (Pet. App. 6a). The Court of Appeals simply held that the District Court's understandable sympathy could not override the "language and meaning of the bankruptcy statutes and rules," which prohibit pre-confirmation payments to certain unsecured creditors. (Pet. App. 6a). That holding cannot be impeached by petitioner.

Petitioner's contention that the emergency treatment fund was a permitted exercise of "sound economic business judgment" under Section 363(b) of the Bankruptcy Code

in that it was an attempt to mitigate damages (Pet. 11-12) is without basis.[10] The Court of Appeals properly ruled that the movants' invocation of Robins' "business judgment" could not justify establishment of the emergency treatment fund. (Pet. App. 8a). The exercise of a debtor's business judgment, like the scope of a bankruptcy court's discretion, is circumscribed by the Bankruptcy Code and the Bankruptcy Rules. The statutory scheme precludes the Debtor from paying certain Dalkon Shield claimants prior to the completion of the plan confirmation process, even if it determined to do so in the exercise of its business judgment. (Pet. App. 8a).

Petitioner also suggests a parade of horribles that might befall the bankruptcy system if the Court of Appeals' decision is not reversed. (Pet. 9-10). Petitioner's hypotheticals are inapposite. The present dispute involves payment to certain individuals on account of personal, prepetition claims, not the need to remedy ongoing, postpetition harm to the public health and welfare, in pursuit of which courts have directed or authorized debtors to take remedial actions. *See, e.g., Midlantic Nat'l Bank* v.

10. Petitioner's argument rests on pure conjecture that the fund would "create a substantial benefit to Robins' estate" through the reduction of "the dollar amount of claims against the estate." (Pet. 3, 12). There was no showing that allegedly infertile claimants who might benefit from the fund would ultimately be found to have allowed claims or that such claims would be allowed in an amount no less than the amount paid out of the fund for that claimant. As to those fund beneficiaries whose claims ultimately would be disallowed or allowed at an amount less than the fund payments, Robins could not recoup payments. Moreover, payments by Robins to beneficiaries ultimately found to have allowed claims would, at most, reduce such claims by the amount spent on treatment - - the claimants would not waive, reduce or compromise their claims as a result of having treatment that may or may not be successful. Thus, petitioner's prediction that the Debtor's estate would reap an economic benefit from the establishment of the fund is unfounded.

New Jersey Dep't of Envtl. Protection, 474 U.S. 494, 507 (1986) (ruling that trustee could not abandon property pursuant to Section 554 of the Bankruptcy Code where abandonment would violate state statutory or regulatory scheme designed to protect public health and safety); *In re Vermont Real Estate Inv. Trust*, 25 Bankr. 804, 806 (Bankr. D. Vt. 1982) (approving payment of expenses incurred in demolishing dangerous building as administrative expense since work was necessary for preservation of estate and was necessary "for the safety and welfare of the public in general.").

The Court of Appeals' decision did not, as petitioner argues, present an unduly "restrictive" reading of the Bankruptcy Code (Pet. 9) that will foreclose other debtors or creditors from obtaining appropriate relief where necessary to advance or protect the public health and welfare. Petitioner's view reflects not only a misreading of the Court of Appeals' decision, but also a desire to have this Court legislate a solution to, or issue a declaratory judgment in respect of, hypothetical problems that do not yet exist in mass tort cases that have not yet been, and may not be, filed. The Court should consider such problems, if any, on a case-by-case basis, and should decline petitioner's invitation to rewrite the carefully crafted distributive scheme embodied in the Bankruptcy Code and the Bankruptcy Rules.

B. The Emergency Treatment Fund Will Be Implemented if the Debtor's Plan Is Confirmed

The plan confirmation process is now underway in this lengthy, complex Chapter 11 case. After over two years of litigation, a consensual Plan, which has the support of all official committees including the representatives of the

Dalkon Shield claimants, has been filed with the Bankruptcy Court. A hearing on the adequacy of the Disclosure Statement is scheduled for March 21, 1988; if the Disclosure Statement is approved, the Plan will be disseminated to and voted upon by creditors and shareholders and considered for confirmation by the District Court within several months.

The Plan expressly provides, *inter alia*, for the post-confirmation establishment of an emergency treatment fund. If the Plan scales the disclosure, voting, and confirmation hurdles of the Bankruptcy Code and the Bankruptcy Rules, the relief requested in the petition will be implemented. In all likelihood, the matter will be moot at or soon after the time of the Court's full consideration. Accordingly, the Court should not grant the petition.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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March 2, 1988

APPENDIX

APPENDIX

SECTION 1121 (11 U.S.C. § 1121)

§ 1121. Who may file a plan.

(a) The debtor may file a plan with a petition commencing a voluntary case, or at any time in a voluntary case or an involuntary case.

(b) Except as otherwise provided in this section, only the debtor may file a plan until after 120 days after the date of the order for relief under this chapter.

(c) Any party in interest, including the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee, may file a plan if and only if—

(1) a trustee has been appointed under this chapter;

(2) the debtor has not filed a plan before 120 days after the date of the order for relief under this chapter; or

(3) the debtor has not filed a plan that has been accepted, before 180 days after the date of the order for relief under this chapter, by each class of claims or interests that is impaired under the plan.

(d) On request of a party in interest made within the respective periods specified in subsections (b) and (c) of this section and after notice and a hearing, the court may for cause reduce or increase the 120-day period or the 180-day period referred to in this section.

SECTION 1122 (11 U.S.C. § 1122)

§ 1122. Classification of claims or interests.

(a) Except as provided in subsection (b) of this section, a plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class.

(b) A plan may designate a separate class of claims consisting only of every unsecured claim that is less than or reduced to an amount that the court approves as reasonable and necessary for administrative convenience.

SECTION 1123 (11 U.S.C. § 1123)

§ 1123. Contents of plan.

(a) Notwithstanding any otherwise applicable nonbankruptcy law, a plan shall—

(1) designate, subject to section 1122 of this title, classes of claims, other than claims of a kind specified in section 507(a)(1), 507(a)(2), or 507(a)(7) of this title and classes of interests;

(2) specify any class of claims or interests that is not impaired under the plan;

(3) specify the treatment of any class of claims or interests that is impaired under the plan;

(4) provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim or interest agrees to a less favorable treatment of such particular claim or interest;

(5) provide adequate means for the plan's implementation such as—

(A) retention by the debtor of all or any part of the property of the estate;

(B) transfer of all or any part of the property of the estate to one or more entities, whether organized before or after the confirmation of such plan;

(C) merger or consolidation of the debtor with one or more persons;

(D) sale of all or any part of the property of the estate, either subject to or free of any lien, or the distribution of all or any part of the property of the estate among those having an interest in such property of the estate;

(E) satisfaction or modification of any lien;

(F) cancellation or modification of any indenture or similar instrument;

(G) curing or waiving of any default;

(H) extension of a maturity date or a change in an interest rate or other term of outstanding securities;

(I) amendment of the debtor's charter; or

(J) issuance of securities of the debtor, or of any entity referred to in subparagraph (B) or (C) of this paragraph, for cash, for property, for existing securities, or in ex-

change for claims or interests, or for any other appropriate purpose;

(6) provide for the inclusion in the charter of the debtor, if the debtor is a corporation, or of any corporation referred to in paragraph (5)(B) or (5)(C) of this subsection, of a provision prohibiting the issuance of nonvoting equity securities, and providing, as to the several classes of securities possessing voting power, an appropriate distribution of such power among such classes, including, in the case of any class of equity securities having a preference over another class of equity securities with respect to dividends, adequate provisions for the election of directors representing such preferred class in the event of default in the payment of such dividends; and

(7) contain only provisions that are consistent with the interests of creditors and equity security holders and with public policy with respect to the manner of selection of any officer, director, or trustee under the plan and any successor to such officer, director, or trustee.

(b) Subject to subsection (a) of this section, a plan may—

(1) impair or leave unimpaired any class of claims, secured or unsecured, or of interests;

(2) subject to section 365 of this title, provide for the assumption, rejection, or assignment of any executory contract or unexpired lease of the debtor not previously rejected under such section;

(3) provide for—

(A) the settlement or adjustment of any claim or interest belonging to the debtor or to the estate; or

(B) the retention and enforcement by the debtor, by the trustee, or by a representative of the estate appointed for such purpose, of any such claim or interest;

(4) provide for the sale of all or substantially all of the property of the estate, and the distribution of the proceeds of such sale among holders of claims or interests; and

(5) include any other appropriate provision not inconsistent with the applicable provisions of this title.

(c) In a case concerning an individual, a plan proposed by an entity other than the debtor may not provide for the use, sale, or lease of property exempted under section 522 of this title, unless the debtor consents to such use, sale, or lease.

SECTION 1124 (11 U.S.C. § 1124)

§ 1124. Impairment of claims or interests. Except as provided in section 1123(a)(4) of this title, a class of claims or interests is impaired under a plan unless, with respect to each claim or interest of such class, the plan—

(1) leaves unaltered the legal, equitable, and contractual rights to which such claim or interest entitles the holder of such claim or interest;

(2) notwithstanding any contractual provision or applicable law that entitles the holder of such claim or interest to demand or receive accelerated payment of such claim or interest after the occurrence of a default—

(A) cures any such default that occurred before or after the commencement of the case under this title, other than a default of a kind specified in section 365(b)(2) of this title;

(B) reinstates the maturity of such claim or interest as such maturity existed before such default;

(C) compensates the holder of such claim or interest for any damages incurred as a result of any reasonable reliance by such holder on such contractual provision or such applicable law; and

(D) does not otherwise alter the legal, equitable, or contractual rights to which such claim or interest entitles the holder of such claim or interest; or

(3) provides that, on the effective date of the plan, the holder of such claim or interest receives, on account of such claim or interest, cash equal to—

(A) with respect to a claim, the allowed amount of such claim; or

(B) with respect to an interest, if applicable, the greater of—

(i) any fixed liquidation preference to which the terms of any security representing such interest entitle the holder of such interest; or

(ii) any fixed price at which the debtor, under the terms of such security, may redeem such security from such holder.

SECTION 1125 (11 U.S.C. § 1125)

§ 1125. Postpetition disclosure and solicitation.

(a) In this section—

(1) "adequate information" means information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records, that would enable a hypothetical reasonable investor typical of holders of claims or interests of the relevant class to make an informed judgment about the plan, but adequate information need not include such information about any other possible or proposed plan; and

(2) "investor typical of holders of claims or interests of the relevant class" means investor having—

(A) a claim or interest of the relevant class;

(B) such a relationship with the debtor as the holders of other claims or interests of such class generally have; and

(C) such ability to obtain such information from sources other than the disclosure required by this section as holders of claims or interests in such class generally have.

(b) An acceptance or rejection of a plan may not be solicited after the commencement of the case under this title from a holder of a claim or interest with respect to such claim or interest unless, at the time of or before such solicitation, there is transmitted to such holder the plan or a summary of the plan, and a written disclosure statement approved, after notice and a hearing, by the court as containing adequate information. The court may approve a disclosure statement without a valuation of the debtor or an appraisal of the debtor's assets.

(c) The same disclosure statement shall be transmitted to each holder of a claim or interest of a particular class, but there may be transmitted different disclosure statements, differing in amount, detail, or kind of information, as between classes.

(d) Whether a disclosure statement required under subsection (b) of this section contains adequate information is not governed by any otherwise applicable non-bankruptcy law, rule, or regulation, but an agency or official whose duty is to administer or enforce such a law, rule, or regulation may be heard on the issue of whether a disclosure statement contains adequate information. Such an agency or official may not appeal from, or otherwise seek review of, an order approving a disclosure statement.

(e) A person that solicits acceptance or rejection of a plan, in good faith and in compliance with the applicable provisions of this title, or that participates, in good faith and in compliance with the applicable provisions of this title, in the offer, issuance, sale, or purchase of a security, offered or sold under the plan, of the debtor, of an affiliate participating in a joint plan with the debtor, or of a newly organized successor to the debtor, or of a newly organized successor to the debtor under the plan, is not liable, on account of such solicitation or participation, for violation of any applicable law, rule, or regulation governing solicitation of acceptance or rejection of a plan or the offer, issuance, sale, or purchase of securities.

SECTION 1126 (11 U.S.C. § 1126)

§ 1126. Acceptance of plan.

(a) The holder of a claim or interest allowed under section 502 of this title may accept or reject a plan. If the United States is a creditor or equity security holder, the Secretary of the Treasury may accept or reject the plan on behalf of the United States.

(b) For the purposes of subsections (c) and (d) of this section, a holder of a claim or interest that has accepted or rejected the plan before the commencement of the case under this title is deemed to have accepted or rejected such plan, as the case may be, if—

(1) the solicitation of such acceptance or rejection was in compliance with any applicable nonbankruptcy law, rule, or regulation governing the adequacy of disclosure in connection with such solicitation; or

(2) if there is not any such law, rule, or regulation, such acceptance or rejection was solicited after disclosure to such holder of adequate information, as defined in section 1125(a) of this title.

(c) A class of claims has accepted a plan if such plan has been accepted by creditors, other than any entity designated under subsection (e) of this section, that hold at least two-thirds in amount and more than one-half in number of the allowed claims of such class held by creditors, other than any entity designated under subsection (e) of this section, that have accepted or rejected such plan.

(d) A class of interests has accepted a plan if such plan has been accepted by holders of such interests, other than any entity designated under subsection (e) of this section, that hold at least two-thirds in amount of the allowed interests of such class held by holders of such interests, other than any entity designated under subsection (e) of this section, that have accepted or rejected such plan.

(e) On request of a party in interest, and after notice and a hearing, the court may designate any entity whose acceptance or rejection of such plan was not in good faith, or was not solicited or procured in good faith or in accordance with the provisions of this title.

(f) Notwithstanding any other provision of this section, a class that is not impaired under a plan, and each holder of a claim or interest of such class, are conclusively presumed to have accepted the plan, and solicitation of acceptances with respect to such class from the holders of claims or interests of such class is not required.

(g) Notwithstanding any other provision of this section, a class is deemed not to have accepted a plan if such plan provides that the claims or interests of such class do not entitle the holders of such claims or interests to receive or retain any property under the plan on acount of such claims or interests.

SECTION 1127 (11 U.S.C. § 1127)

§ 1127. Modification of plan.

(a) The proponent of a plan may modify such plan at any time before confirmation, but may not modify such plan so that such plan as modified fails to meet the requirements of sections 1122 and 1123 of this title. After the proponent of a plan files a modification of such plan with the court, the plan as modified becomes the plan.

(b) The proponent of a plan or the reorganized debtor may modify such plan at any time after confirmation of such plan and before substantial consummation of such plan, but may not modify such plan so that such plan as modified fails to meet the requirements of sections 1122 and 1123 of this title. Such plan as modified under this subsection becomes the plan only if circumstances warrant such modification and the court, after notice and a hearing, confirms such plan as modified, under section 1129 of this title.

(c) The proponent of a modification shall comply with section 1125 of this title with respect to the plan as modified.

(d) Any holder of a claim or interest that has accepted or rejected a plan is deemed to have accepted or rejected, as the case may be, such plan as modified, unless, within the time fixed by the court, such holder changes such holder's previous acceptance or rejection.

SECTION 1128 (11 U.S.C. § 1128)

§ 1128. Confirmation hearing.

(a) After notice, the court shall hold a hearing on confirmation of a plan.

(b) A party in interest may object to confirmation of a plan.

SECTION 1129 (11 U.S.C. § 1129)

§ 1129. Confirmation of plan.

(a) The court shall confirm a plan only if all of the following requirements are met:

(1) The plan complies with the applicable provisions of this title.

(2) The proponent of the plan complies with the applicable provisions of this title.

(3) The plan has been proposed in good faith and not by any means forbidden by law.

(4) Any payment made or to be made by the proponent, by

the debtor, or by a person issuing securities or acquiring property under the plan, for services or for costs and expenses in or in connection with the case, or in connection with the plan and incident to the case, has been approved by, or is subject to the approval of, the court as reasonable; [*sic*]

(5)(A)(i) The proponent of the plan has disclosed the identity and affiliations of any individual proposed to serve, after confirmation of the plan, as a director, officer, or voting trustee of the debtor, an affiliate of the debtor participating in a joint plan with the debtor, or a successor to the debtor under the plan; and

(ii) the appointment to, or continuance in, such office of such individual, is consistent with the interests of creditors and equity security holders and with public policy; and

(B) the proponent of the plan has disclosed the identity of any insider that will be employed or retained by the reorganized debtor, and the nature of any compensation for such insider.

(6) Any governmental regulatory commission with jurisdiction, after confirmation of the plan, over the rates of the debtor has approved any rate change provided for in the plan, or such rate change is expressly conditioned on such approval.

(7) With respect to each impaired class of claims or interests—

(A) each holder of a claim or interest of such class—

(i) has accepted the plan; or

(ii) will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date; or

(B) if section 1111(b)(2) of this title applies to the claims of such class, each holder of a claim of such class will receive or retain under the plan on account of such claim property of a value, as of the effective date of the plan, that is not less than the value of such holder's interest in the estate's interest in the property that secures such claims.

(8) With respect to each class of claims or interests—

(A) such class has accepted the plan; or

(B) such class is not impaired under the plan.

(9) Except to the extent that the holder of a particular claim has agreed to a different treatment of such claim, the plan provides that—

(A) with respect to a claim of a kind specified in section 507(a)(1) or 507(a)(2) of this title, on the effective date of the plan, the holder of such claim will receive on account of such claim cash equal to the allowed amount of such claim;

(B) with respect to a class of claims of a kind specified in section 507(a)(3), 507(a)(4), 507(a)(5) or 507(a)(6) of this title, each holder of a claim of such class will receive—

(i) if such class has accepted the plan, deferred cash payments of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or

(ii) if such class has not accepted the plan, cash on the effective date of the plan equal to the allowed amount of such claim; and

(C) with respect to a claim of a kind specified in section 507(a)(7) of this title, the holder of such claim will receive on account of such claim deferred cash payments, over a period not exceeding six years after the date of assessment of such claim, of a value, as of the effective date of the plan, equal to the allowed amount of such claim.

(10) If a class of claims is impaired under the plan, at least one class of claims that is impaired under the plan has accepted the plan, determined without including any acceptance of the plan by any insider.

(11) Confirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan.

(12) All fees payable under section 1930, as determined by

the court at the hearing on confirmation of the plan, have been paid or the plan provides for the payment of all such fees on the effective date of the plan.

(b)(1) Notwithstanding section 510(a) of this title, if all of the applicable requirements of subsection (a) of this section other than paragraph (8) are met with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.

(2) For the purpose of this subsection, the condition that a plan be fair and equitable with respect to a class includes the following requirements:

(A) With respect to a class of secured claims, the plan provides—

(i)(I) that the holders of such claims retain the liens securing such claims, whether the property subject to such liens is retained by the debtor or transferred to another entity, to the extent of the allowed amount of such claims; and

(II) that each holder of a claim of such class receive on account of such claim deferred cash payments totaling at least the allowed amount of such claim, of a value, as of the effective date of the plan, of at least the value of such holder's interest in the estate's interest in such property;

(ii) for the sale, subject to section 363(k) of this title, of any property that is subject to the liens securing such claims, free and clear of such liens, with such liens to attach to the proceeds of such sale, and the treatment of such liens on proceeds under clause (i) or (iii) of this subparagraph; or

(iii) for the realization by such holders of the indubitable equivalent of such claims.

(B) With respect to a class of unsecured claims—

(i) the plan provides that each holder of a claim of

such class receive or retain on account of such claim property of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or

(ii) the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property.

(C) With respect to a class of interests—

(i) the plan provides that each holder of an interest of such class receive or retain on account of such interest property of a value, as of the effective date of the plan, equal to the greatest of the allowed amount of any fixed liquidation preference to which such holder is entitled, any fixed redemption price to which such holder is entitled, or the value of such interest; or

(ii) the holder of any interest that is junior to the interests of such class will not receive or retain under the plan on account of such junior interest any property.

(c) Notwithstanding subsections (a) and (b) of this section and except as provided in section 1127(b) of this title, the court may confirm only one plan, unless the order of confirmation in the case has been revoked under section 1144 of this title. If the requirements of subsection (a) and (b) of this section are met with respect to more than one plan, the court shall consider the preferences of creditors and equity security holders in determining which plan to confirm.

(d) Notwithstanding any other provision of this section, on request of a party in interest that is a governmental unit, the court may not confirm a plan if the principal purpose of the plan is the avoidance of taxes or the avoidance of the application of section 5 of the Securities Act of 1933 (15 U.S.C. 77e). In any hearing under this subsection, the governmental unit has the burden of proof on the issue of avoidance.

Rule 3021.

DISTRIBUTION UNDER PLAN

After confirmation of a plan, distribution shall be made to creditors whose claims have been allowed, to holders of stock, bonds, debentures, notes, and other securities of record at the time of commencement of distribution whose claims or equity security interests have not been disallowed and to indenture trustees who have filed claims pursuant to Rule 3003(c)(5) and which have been allowed.